

 ORIGINAL

Expert Testimony of THOMAS R. BARTH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
JAMES A. BRUNO and
KATHLEEN M. BRUNO,

Plaintiffs,

5:09-CV-01308

-VS-

NIAGARA MOHAWK POWER CORPORATION,
LG CONSTRUCTORS, INC., and
TDT REALTY CORP., CORELLIS HOLDING CORP.,
and THOMAS A. CORELLIS,

Defendants.

-----X
LG CONSTRUCTORS, INC.,

Third-Party Plaintiff,

-VS-

MICHELS POWER, A DIVISION OF MICHELS
CORPORATION and MICHELS CORPORATION,

Third-Party Defendant.
-----X

EXPERT TESTIMONY of **THOMAS R. BARTH**, held on
November 8, 2011, commencing at 10:05 a.m., at the
offices of Powers & Santola, LLP, 39 North Pearl
Street, Albany, New York 12207, pursuant to Notice;
before Susan Florio, RPR and Notary Public in and
for the State of New York.

Dianne E. Wilson - Professional Reporting Service - (518)439-7605

Susan Florio, RPR

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 back.)

3 A. It's a question that I don't understand.

4 Q. All right. Okay.

5 A. That you are asking.

6 Q. Moving over to Page 4, maintaining a safe
7 approach distance. I think in the beginning you
8 indicate that a licensed operator of a mobile
9 crane working in the vicinity of power lines must
10 consider all power lines around or near construction
11 demolition and excavation sites as energized until
12 assurance has been given that they are otherwise
13 by qualified representatives of the owner of the
14 power lines. Do you see that?

15 A. Yes.

16 Q. All right. And would you agree that
17 Parker should have assumed that these power lines
18 were energized?

19 A. Yes.

20 Q. All right. Then it goes on, Parker, the
21 licensed -- while this might be considered to be a
22 violation of 12 NYCRR 23, et al., by Martin
23 Parker, the licensed crane operator, the fact is

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 Q. Were you aware, do you recall Mr. Beatty's
3 testimony that, in fact, the status of the number
4 17 line as energized had been conveyed to Mr. Parker
5 and Mr. Bruno at morning meetings of the drilled
6 foundations folks?

7 MR. SANTOLA: Object to the form of
8 the question. I don't believe that was an
9 accurate description of the testimony, but go
10 ahead and answer if you can.

11 A. I believe that they were notified that
12 the power lines were energized.

13 Q. All right. So, that based on what you've
14 concluded, both Mr. Parker and Mr. Bruno knew that
15 the line was energized prior to the occurrence of
16 the accident?

17 A. Yes.

18 Q. All right. And then in that section you
19 go on to note that there will be signs to warn
20 them of the presence of the lines, et cetera. And
21 there were durable signs on the crane itself,
22 weren't there, as far as you know?

23 MR. SANTOLA: Object to the form.

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 A. Um-hmm.

3 Q. Now, pursuant to that regulation, the
4 requirement is if a crane is going to be operated
5 closer than 10 feet there are certain requirements
6 that are to be followed, isn't that the case?

7 A. Yes.

8 Q. And one of the requirements is that the
9 utility be notified in writing that they are going
10 to come within 10 feet of the line, isn't that so?

11 A. That's what I understand, yes.

12 Q. The utility here is Niagara Mohawk, isn't
13 it?

14 A. I don't know who, you know. I can't --
15 who is what there.

16 Q. If we assume that Niagara Mohawk is the
17 utility, it was entitled to written notification
18 that there was going to be an approach closer than
19 ten feet? Can you agree with that?

20 A. Yes.

21 Q. All right. Based upon your review of the
22 testimony would you agree with me that Niagara
23 Mohawk did not receive such written notice?

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 until safety concerns had been addressed. Do you
3 see that?

4 A. Yes. Yes.

5 Q. All right. And he didn't stop the
6 operation of the crane, isn't that true?

7 A. That's correct.

8 Q. All right. And that would be a departure
9 from good operating practices by an operator,
10 isn't that so?

11 A. That would be correct.

12 Q. All right. On the next page you indicate
13 that crane movement should not resume until the
14 operator and signal person agree that the issue at
15 hand has been resolved.

16 A. Are we on Page 6?

17 Q. Page 6, yes.

18 A. What paragraph?

19 Q. Last paragraph. Tell you what. Let me
20 withdraw that. Let me hold back for just a
21 second.

22 Let me stay on Page 5, if I could. Okay?

23 A. Okay.

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 Q. You indicate on maybe the fourth sentence
3 down in that last paragraph, "According to Parker,
4 he began to swing the crane with the suspended
5 load to his right. He could not see where the tip
6 of the crane's boom was in relation to the
7 overhead lines."

8 And in continuing the operation of the
9 crane when he couldn't make that observation that
10 would be another departure from good operating
11 practices by Mr. Parker, wouldn't it?

12 A. Yes.

13 Q. And then below that down near the bottom
14 you indicate that if the operator cannot make the
15 clearance judgment safely, he must stop the
16 operation and require the presence of a dedicated
17 safety observer and/or discuss the dangers with
18 the lift director. And we can agree that didn't
19 happen, isn't that so?

20 A. That's correct.

21 Q. And that was a departure by Mr. Parker --

22 A. Yes.

23 Q. -- from good operating practices?

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 Over on the next page under the second --
3 well, I guess it's the first full paragraph on the
4 page. It says ASME B-30, et cetera. Also lays
5 out the responsibility of the crane operator which
6 in part requires whenever the operator has doubt
7 as to the safety of crane operations, he will
8 review the requirements with the lift director
9 before operations to understand which conditions
10 could adversely affect the operation of the crane.

11 We can agree that didn't happen, isn't
12 that so?

13 A. Yes. We can agree.

14 Q. And that was a departure by Mr. Parker
15 from good operating practices?

16 A. Yes.

17 Q. All right. And then down at the bottom
18 of that, the next paragraph down, it says that the
19 crane movement will not resume until the operator
20 and signal person agree that the issue at hand has
21 been resolved, and this was not complied with by
22 the crane operator. We can agree that Mr. Parker
23 didn't do that as well, isn't that so?

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 A. Yes.

3 Q. And that was a departure from good
4 operating practices?

5 A. Yes.

6 Q. Moving on to number 6 on Page 6. Down
7 near sort of the middle of the paragraph it
8 indicates that the crane operator, Martin Parker,
9 violated these procedures by initiating the
10 operation of a mobile crane in proximity of
11 overhead lines before any daily job briefing or
12 pre-task plan procedures were instituted. Do you
13 see that? Sort of in the middle of the paragraph.

14 A. Yeah.

15 Q. And that would be a further departure
16 from good operating practices by Mr. Bruno [sic],
17 correct?

18 A. Yes.

19 MR. SANTOLA: Object to the form of
20 the question. Did you mean Bruno or Parker?

21 MR. GLASHEEN: Thank you, Dan.

22 Mr. Parker I meant it to be.

23 THE WITNESS: That's what I took it

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 as.

3 Q. Moving over to Page 7 and number 7,
4 second sentence, it says due to the size and
5 forces with which the crane operates, any
6 inadvertent contact can result in significant
7 damage to the property and/or injuries to persons
8 in the vicinity. Do you see that?

9 A. Yes. I do.

10 Q. Now, this was an 80-ton mobile crane?

11 A. Yes. It was.

12 Q. It's a piece of equipment that's got some
13 size to it, isn't that --

14 A. Some what?

15 Q. Some size to it?

16 A. Yes.

17 Q. In terms of the movement of the boom of
18 the crane, that can cause damage to objects that
19 it might come in contact with, isn't that so?

20 A. That's correct.

21 Q. All right. And the boom of the crane
22 would be capable of damaging a conductor, an
23 electric conductor, if it hit it, isn't that so?

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 A. That's correct.

3 Q. And it would be capable of breaking an
4 electric conductor if it hit it with sufficient
5 force?

6 A. Yes.

7 Q. All right. And so the ten foot clearance
8 rule, that applies no matter what, even if the
9 line is de-energized, isn't that so?

10 A. I'm having a difficult problem with that
11 question because everybody uses this ten foot, ten
12 foot, ten foot. In this situation there's many
13 different restrictions that say 15, 20, so.

14 Q. Okay. Let me rephrase the question.
15 So, the minimum approach distance,
16 whatever it may be under the different standards,
17 that applies even if the line is de-energized,
18 isn't that so?

19 A. Your question isn't complete. There's
20 many things that have to happen before that can
21 take into place.

22 Q. Well, let me move down a little further
23 and I think maybe the fourth sentence down you

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 indicate that whether or not the overhead line was
3 energized, the operator must still maintain a
4 minimum of ten foot clearance in order to avoid
5 inadvertent contact and resulting damage to the
6 overhead line. Do you see that sentence?

7 A. I don't see it. Where are you at?

8 Q. Right here.

9 A. Right here. Okay. Yes.

10 Q. Okay. And you agree with that?

11 A. Yes.

12 Q. All right. So, whether or not the line
13 was energized or not, Parker in coming closer than
14 ten feet violated that rule, isn't that so?

15 A. Yes. He did.

16 Q. And that would be another departure by
17 Mr. Parker from good operating practices?

18 A. Yes.

19 Q. All right. Down further in that
20 paragraph there's a sentence, if a crane operator
21 seeks assistance in determining proper clearances
22 from another individual, that individual must be
23 properly positioned relative to the crane boom and

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 the overhead line in order to accurately assess
3 the clearances. Do you see that sentence?

4 A. Yes. I do.

5 Q. All right. Having reviewed the
6 photographs in this case can you tell us where you
7 would say the spotter should have been located?

8 A. Can I see a picture?

9 Q. Sure. I'll give you a couple of
10 pictures. I'm not sure which would do you best.
11 Look at those.

12 A. Okay. Now, these are the lines that are
13 energized, right?

14 Q. Yes.

15 A. Okay. This setup is wrong. The crane is
16 in the improper place to go in there. He has to
17 be 15 feet from the line. The spotter would be
18 over here to notify him he's within 15 feet of
19 that line or 20 feet away from the line. They
20 should have the guy standing there. He could put
21 flags out, anything, to know where the 10, 15 or
22 20 feet is to away from the line before he gets
23 into it. But he's into the lines.

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 Q. So, if there were a dedicated spotter
3 where he should be located would be -- if I'm
4 understanding correctly, in front of the crane
5 obviously so the crane operator can see him?

6 A. Yes.

7 Q. And 15 to 20 feet I'm going to say to the
8 west or towards the new line; is that correct?

9 A. Yes. Yes.

10 Q. All right. How far away from the crane
11 should he be located?

12 A. Where he can make a good visual judgment.
13 It doesn't say feet away from the crane or
14 anything like that. He should be at the other end
15 of the boom, would be a good place to be. That
16 way he can see the wires, the load block, low load
17 block, good vision to the crane operator.

18 Q. And in this case Mr. Bruno was actually
19 underneath the conductors, wasn't he?

20 A. He was under the lines, yes.

21 Q. So, in your opinion that wouldn't be a
22 good place for the spotter or observer to be
23 located, is that true?

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 A. That's correct.

3 Q. All right. You mentioned that where the
4 position in Section 9, if I'm understanding it
5 correctly, you are indicating that where Bruno was
6 located from his position looking directly up, the
7 separation between the end of the boom and the
8 overhead line cannot be visually assessed. Why do
9 you say that?

10 A. Because he's under the boom, he can't see
11 the distance. It was already past a safe
12 distance. Mr. Parker had a better view of the
13 boom and everything else. So, Bruno didn't have
14 the advantages of Mr. Parker.

15 Q. Why did Mr. Parker have a better view
16 than Bruno?

17 A. Because he was higher. He had a -- he
18 knew the height of his boom tip. He knew the
19 angle of his boom. He knew the length of his
20 boom. It's all there for him.

21 Q. So, let me just double back though. From
22 Mr. Bruno's perspective, while he may not have had
23 as good a view of the clearances as Parker, would

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 he still be able to observe the clearances?

3 A. Accurately, no.

4 Q. Is that because of some perception or
5 perceptual problem?

6 A. By looking at it. I don't know what you
7 would call it. He wouldn't be able to see it
8 accurately and determine it.

9 Q. But Mr. Parker should have been able to
10 do so?

11 A. Absolutely. He had all the information
12 there in the crane or the cab.

13 Q. And because he had that information
14 available and was in a better position to see, is
15 that why you say for Parker to claim he relied on
16 Bruno for input on the clearance between the end
17 of the boom and overhead lines is a serious
18 departure from good and accepted practices?

19 A. Yes.

20 Q. When you say a serious departure, is
21 another way of saying that, is it a gross
22 departure?

23 A. I don't know the terms, but it's a

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 Item I, that signals to the equipment operator
3 shall be given by one person designated for the
4 task?

5 A. Yes.

6 Q. In terms of this safety manual, is it
7 fair to say that that indicates that Mr. Bruno had
8 some appreciation of the dangers associated with
9 operating equipment near energized overhead lines?

10 A. Yes.

11 Q. All right. Thank you. You mentioned
12 that you did review the testimony of Martin
13 Parker?

14 A. Yes.

15 Q. All right. And do you recall the
16 testimony where he indicated that their foreman
17 was Mr. Beatty?

18 A. Yes.

19 Q. Do you recall the testimony from
20 Mr. Parker that Mr. Beatty gave -- when he gave
21 directions for the work, he gave it to Mr. Bruno,
22 do you recall that testimony?

23 A. I believe so.

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 Mr. Bruno had just as much ability to say, no, we
3 are not going to put it there, didn't he?

4 A. Again, Mr. Parker has the final say.

5 Q. Mr. Parker, does he have the final say if
6 he's recommending a course of action that is
7 highly dangerous?

8 A. Repeat that question again.

9 Q. Does Mr. Parker have the final say if
10 he's recommending a course of action that is
11 highly dangerous?

12 A. Mr. Parker has the final say on whether
13 that crane is going to operate, where it's going
14 to be operated, how it's going to be done.

15 Q. So, Mr. Bruno has no say whatsoever in
16 this determination, is that so?

17 A. Mr. Bruno is a truck driver.

18 Q. Would you agree with me that the best way
19 to avoid a contact with an energized electric line
20 is to stay away from it?

21 A. Yes.

22 Q. All right. And would you agree with me
23 that if there are other places to unload those

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 caissons that do not require the crane to go under
3 the number 17 line that's a better practice to
4 follow?

5 A. Yes.

6 Q. All right. I'd like to show you Exhibit
7 35, which was marked at a deposition dated
8 12/1/10, and I'm going to direct your attention to
9 the upper photograph and I am going to represent
10 to you that that is a photograph taken by the OSHA
11 inspector on the day of the accident and it depicts
12 a portion of the Corellis laydown area, which was
13 located to the east of the right of way.

14 So, having that information do you see
15 caissons in that photograph?

16 A. Yes. I do.

17 Q. All right. And do you see that those
18 caissons are located at a location where there are
19 no energized conductors close by?

20 A. Yes. I do.

21 Q. All right. And can we agree that that,
22 in terms of safety, that that would have been a
23 better location to unload those caissons and avoid

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 Q. I'll going to represent to you that the
3 person who wrote this information is Martin
4 Parker.

5 A. Okay.

6 Q. That's what the testimony has indicated.
7 Do you see where one of the hazards noted is
8 electric shock?

9 A. Um-hmm.

10 Q. All right. And do you see the language
11 properly rig and secure all loads?

12 A. Um-hmm.

13 Q. All right. Do you see adhere to safety
14 and rigging cautions?

15 A. Yes.

16 Q. Do you see tailboard, plan your work and
17 work your plan?

18 A. Um-hmm.

19 Q. Do you see where Parker said if unsure of
20 task, stop, ask, and understand before proceeding?

21 A. Yes.

22 Q. If task or plan changes, everyone on the
23 crew must know?

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 A. Yes.

3 Q. All right. I'm going to represent to you
4 that's Mr. Parker's signature. Do you see that?

5 A. Yes.

6 Q. And do you see Mr. Bruno's signature
7 there?

8 A. Yes.

9 Q. And I'd like to show you Exhibit E from a
10 deposition dated 6/3/11. And, again, I'm going to
11 represent to you that this is in Mr. Parker's
12 handwriting. Do you see electric shock being
13 noted there?

14 A. Yes.

15 Q. Do you see this language energized line
16 20 feet -- can you make that out?

17 A. From.

18 Q. From load?

19 A. Okay.

20 Q. Does that look like load?

21 A. It could be. Yes.

22 Q. All right. And do you see them saying
23 345 kV grounded line safety -- withdraw that.

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 Do you see qualified signal person?

3 A. Yes.

4 Q. And do you see tag load?

5 A. Yes.

6 Q. Does that mean use a tag line?

7 A. That would be my --

8 Q. Your best guess?

9 A. Yes.

10 Q. All right. And do you see again
11 tailboard, plan your work and work your plan?

12 A. Yes.

13 Q. Do you see if unsure, stop and ask until
14 you understand?

15 A. Yes.

16 Q. Keep unnecessary personnel out of the
17 area?

18 A. Yes.

19 Q. Use a signal man?

20 A. Yes.

21 Q. Use tag line on load?

22 A. Yes.

23 Q. Do you see all those things?

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 A. Yes.

3 Q. And do you see Mr. Parker's signature?

4 A. Right.

5 Q. And do you see Mr. Bruno's signature?

6 A. Is that his? I don't know.

7 Q. I'm going to represent to you that it is.

8 A. Okay.

9 MR. GLASHEEN: And, Dan, you can
10 disagree.

11 MR. SANTOLA: (Nodding in the
12 negative.)

13 MR. CERUSSI: What's the date of
14 that PTP?

15 MR. GLASHEEN: 5/30/09.

16 MR. SANTOLA: Wait a minute.

17 5/30/09 is the date of it?

18 MR. GLASHEEN: Yes.

19 MR. SANTOLA: Okay. I was thinking
20 the date of the exhibit.

21 MR. GLASHEEN: 6/3.

22 Q. Based on those PTPs would you agree with
23 me that both Parker and Bruno were aware of the

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 hazards posed by overhead lines and aware of the
3 mitigation measures to be taken with respect to
4 those lines?

5 A. According to those, yes.

6 Q. All right. By the way, do you remember
7 in the testimony that there was a radio in Bruno's
8 truck that they could have called the foreman to
9 clear up any kind of misunderstandings?

10 A. Yes. I remember that.

11 Q. So, if in the course of this unloading
12 operation if there was any question regarding the
13 energization of the lines or whether it was a good
14 idea to do that or whether they need an additional
15 person, they had the means to request the
16 assistance, didn't they?

17 A. They had a radio, yes.

18 Q. Do you recall the testimony that Mr.
19 Beatty had advised them that if it was raining,
20 just to stop and get inside the truck?

21 A. Say that again. I didn't hear you.
22 There was somebody coughing.

23 Q. Well, let me withdraw that.

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 A. Yes.

3 Q. And would you agree that there are
4 certain safe practices that are generally followed
5 with respect to people who are rigging loads and
6 working around the loads?

7 A. Yes. I would agree with that.

8 Q. All right. And is sort of one of the
9 fundamental rules that you stay away from the load
10 as much as possible?

11 A. At certain times, yes.

12 Q. And would you agree that it's not a good
13 practice to be standing in close proximity to the
14 load?

15 MR. SANTOLA: Object to the form.

16 A. It depends on the situation.

17 Q. All right. In this situation Mr. Bruno,
18 at least based on Mr. Parker's testimony, was
19 standing in front of the second caisson roughly
20 four feet in from the end, I think was the
21 testimony, and either touching it or pretty close
22 to it was Mr. Parker's testimony. Would you agree
23 that that really wasn't a good position for

1 [THOMAS R. BARTH - By Mr. Glasheen]

2 Mr. Bruno to be in?

3 A. It depends on what they were doing at the
4 time.

5 Q. All right. Typically when working around
6 a heavy load like that, is it a good practice to
7 use a tag line?

8 A. Yes.

9 Q. And is the purpose of the tag line to
10 enable the rigger to control the load without
11 getting either under it or in close proximity to
12 it?

13 A. That would be correct.

14 Q. And is it a good practice also in terms
15 of working around electric lines to use an
16 insulated tag line?

17 A. That is correct. Which they were not
18 provided that.

19 Q. All right. Were you aware that they did
20 have tag lines in the truck?

21 A. Yes.

22 Q. All right. Were you aware that no tag
23 line was used?

1
2
3 STATE OF NEW YORK

4 COUNTY OF _____
5
6

7 I have read the foregoing record of my
8 testimony taken at the time and place noted in the
9 heading hereof, and I do hereby acknowledge it to
10 be a true and correct transcript of same.
11

12
13
14 Thomas R Barth

15 THOMAS R. BARTH
16
17

18 Sworn to before me this

19 12 day of December, 2011.

20 Virginia L Davidson

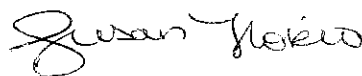
21 NOTARY PUBLIC

22 Virginia L Davidson
Notary Public for South Carolina
My Commission Expires July 29, 2018
23

C E R T I F I C A T I O N

I, Susan Florio, Registered Professional Reporter and Notary Public, do hereby certify that I recorded stenographically the proceedings herein at the time and place noted in the heading hereof, and that the foregoing transcript is true and accurate to the best of my knowledge, skill and ability.

IN WITNESS WHEREOF, I have hereunto set my hand this 19th day of November, 2011.



SUSAN FLORIO, RPR

CORRECTION SHEET

Upon reading the deposition transcript and before subscribing thereto, the deponent indicated that the following changes should be made:

PAGE # **LINE #**

26 3

Should read as follows: ~~RETS, How To Rig UP LOOPS,~~
~~STAKE ON THE CABLE, DOUBLE BASKET,~~
VERTICAL

Reason for Change:

110 17

Should read as follows: By ASME B-30

Reason for Change:

114 3

Should read as follows: ASME B-30

Reason for Change:

Should read as follows: _____

Reason for Change:

Should read as follows: _____

Reason for Change:

Should read as follows: _____

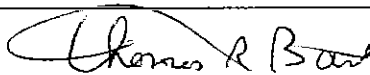
Reason for Change:

Should read as follows: _____

Reason for Change:

Should read as follows: _____

Reason for Change:



Thomas R. Barth

Sworn to before me this
12 day of December, 2011.


 Notary Public

Virginia L. Davidson
 Notary Public for South Carolina
 My Commission Expires July 29, 2019